REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 31 OF 2017

IN THE MATTER OF CHARLES CHEMIMO KIMURGOR (DECEASED)

IBRAHIM HUSSEIN KIMURGOR.....OBJECTOR/APPLICANT

VERSUS

HELLEN CHERONO KIMURGOR.....1ST PETITIONER/RESPONDENT

MATILDA CHEMELI BACHIA.....2ND PETITIONER/RESPONDENT

AGNES MURGOR….....3RD PETITIONER/RESPONDENT

CARLINE CHEBET MURGOR.....4TH PETITIONER/RESPONDENT

NATASHA CHEBET MURGOR.....5TH PETITIONER/RESPONDENT

KATHLEEN CHEPKORIR MURGOR.....6TH PETITIONER/RESPONDENT

RULING

1. The Notice of Motion dated 18th June 2019 supported by the applicant's affidavit sworn on 16th July 2019, seeks to stay the decision by this court delivered on 14th June 2019 pending the hearing and determination of an intended appeal.

2. The background to the application is that judgement was delivered on the 14/06/2019 where the court upheld the petitioners' proposed mode of distribution of the assets relating to the estate of **CHARLES CHEMIMO KIMURGOR (DECEASED)**, and dismissed the objector's (now applicant herein) proposed mode of distribution. The applicant being dissatisfied with the said judgement has since filed a Noticed of Appeal and this application dated 18/06/2019 seeking various orders as set out in the application.

3. The main issue for determination is whether the court ought to grant a stay of execution pending hearing and determination of the intended appeal. **Order 42 Rule 6 of the Civil Procedure Rules** provides inter-alia:

> **No order for stay of execution shall be made under sub-rule (1) unless:**
>
> > **a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and**
> >
> > **b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

4. The law governing grant of such orders is set out under *Order 42 Rule 6* of the Civil Procedures Rules, 2010 as follows:

> **6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of**

stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under sub-rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. **Substantial loss**: The applicant cites the case of **Winfred Nyawira Maina –vs- Peterson Onyiego Gichana (2015) eklr**, where the court considered various factors in executing its discretion in an application granting for stay of execution orders pending appeal that the phrase 'may for sufficient cause order stay of execution of such decree or order' is a wide scope which allows the court to follow after the constitutional prescription under Article 159 and the overriding objective in the administration of justice in matters falling under order 42 Rule 6 of the Civil Procedure Rules. That some of the major prerequisites to ordering of a stay of execution are that:

a) The Applicant has filed an appeal

b) The court is satisfied that substantial loss may result to the Applicant unless the order is made and

c) the Application has been made without unreasonable delay and

d) Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the Applicant.

6. It is further contended that substantial loss may result to the Applicant if the order is not made pointing out that the mode of distribution as determined by the court will result in the objector getting a meagre portion (0.3 Acres) out of the vast multi-million Estate of the deceased.

7. That the applicant has been living and/or residing on a portion of that parcel of land namely **UASIN GISHU/ILLULA/3 measuring 50 Acres** which houses the homestead, yet the petitioners have been given the entire property to his detriment.

Further, he built his residential house/home many years back in accordance with the directions/wishes of the deceased on the above referenced property where he has lived and reside to date, and he is apprehensive that the petitioners are likely to evict him and render him homeless.

8. He laments that he has no alternative place of abode as this is where his home is, his mother (1st petitioner) bore and brought him up and he has never been shown any other place since childhood. (Copy of the home/house annexed and marked as IHM '3')

9. That the 2nd to 6th petitioners are his sisters, but none of them resides or lives at the homestead/property namely **UASIN GISHU/ILLULA/3** hence his endeavour to protect and preserve the Estate of the deceased father.

10. That he has heavily invested in the referenced property in terms of constructing a home which he resides in and has drained financially having ploughed over 25 Acres this year which is his only source of income. (annexed and marked IHM '4' are photos of the Objectors activities on land)

11. He claims that the Respondents are in the process of executing the same which would in essence amount to evicting him from the aforesaid parcel (Uasin Gishu Illula/3 measuring 50 Acres).

12. He cites the case of **Winfred Nyawira Maina (Supra)** the court stated as follows:

"***The fact that substantial loss would occur unless stay is ordered is the cornerstone of the jurisdiction of the High Court under Order 42 Rule 6 of the Civil Procedure Rules. There is an ample judicial authority on this issue but I need not multiply them except to cite the case of Kenya Shell (supra)… in the high court, what a party is supposed to show on the required standard is that substantial loss will occur unless stay is granted and I will discuss that concept in greater detail later, see also a work of this court in Jason Ngumba (2014) eklr that:***

…Here, it is not really a question of measuring the prospects of the appeal itself, but rather whether by asking the Applicant to do what the judgement requires he will become a pious explorer in the judicial process."

13. In opposing the application the respondent submits that the court must be convinced that substantial loss may result to the applicant unless the order is made.

14. In support of this submission the respondent refers to the case of **Antoine Ndiaye vs. African Virtual University [2015] eKLR** where the learned Justice Gikonyo J. held among other things that:

a. "…stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules..."

The Court further observed that:

> ***"…substantial loss is a qualitative concept [Emphasis added]. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals"***

15. In submitting that the onus is on the Applicant to show to this court that in fact his prayers warrant a grant of stay of execution the respondents are categorical that what amounts to substantial loss is not just a matter of guess work. That the Applicant must sufficiently show what loss exactly, they stand to suffer if the stay is not granted. Referring to the case of **Charles Wahome Gethi Vs. Angela Wairimu Gethi (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007)** where the court observed that:

> ***"... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them."***

16. The respondents contend that the applicant has not even scratched the surface and met the threshold for the grant of stay as he has not demonstrated with specificity the substantial loss he stands to suffer if the stay in denied. That it is not sufficient for the Applicant to simply claim that his intended eviction would prejudice him, as he ought to have quantified in a mathematical precision the losses he would suffer.

17. It is further pointed out, that this Court while making the decision on the distribution of the properties of the Estate of the deceased, granted the Applicant land parcel **No. Nandi/Kiminda/1294 and five (5) Acres** of the property known as **Muhoroni Township/Kisumu/21959/14**. And his claims of being rendered destitute and homeless have no basis as, he owns property on **Nandi/Kiminda/1294** with a house build on it already and which he rents out and is in full receipt of the rent income from the same.

18. That in any event, as was argued during the confirmation hearing, the Applicant has also been in receipt of income worth over 10 million from the Estate of the deceased prior to these proceedings, and from which he benefited solely to the exclusion of the other beneficiaries. That this in fact is a substantial gain from the Estate of the deceased which ought to be considered when dealing with the prayer in the current application.

19. It is drawn to this court's attention that the 1st Respondent and the other beneficiaries of the Estate have in good faith undertaken not to transfer or otherwise deal adversely with the properties of the Estate pending the hearing and determination of the Applicant's appeal. The 1st Petitioner has deposed in her Affidavit in response to the current application, all that the beneficiaries want is to be allowed to enjoy the fruit of the judgment, but on the undertaking that they will not transfer the titles pending the determination of the intended appeal.

20. The applicant has lamented about the irreparable loss which will result in being rendered homeless and a destitute. It is however not lost to me, as correctly pointed out by the respondent', that he was in fact awarded a share of the property. Although he has made an attempt to specify the portending loss, I adopt the sentiments expressed in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** and paraphrase what the court stated as a word of caution not to be obsessed with the protection of an appellant or intending appellant in total disregard of the aspirations of a successful opposite party. Indeed there is a real danger in flirting with one party's techni-coloured sob story, contrary to ordinary sound principle that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage.

21. I take not that the respondents have made an undertaking not to deal adversely with the property so as to alienate it such as disposing the same off, pending the hearing of the appeal. That in my view is a reasonable offer, and would cushion the applicant from the feared losses.

22. **<u>Arguable appeal:</u>** The applicant also points out that the intended appeal has very high chances of success as the parcel of land namely **L.R Muhoroni Township /Kisumu/21959/14** has been distributed twice to the Objector/applicant 5 Acres -100% and the same **L.R Muhoroni Township /Kisumu/21959/14 – 100% to the 1st Petitioner** in the Judgement. Also that the farm **Tractor KAN 576R Massey Ferguson** does not form part of the Estate purchased while he was in Britain, and the Application for confirmation seems to have been dismissed.

23. To fortify this position, reference is made to the 1st and 2nd Respondents concession in their Replying Affidavits in response that there is a technical error on the face of the record that can easily be rectified by this court.

24. Without appearing to be dealing with the appeal, I think the issues raised to support the contention that there exists an arguable appeal, are errors on the face of the record which can be easily corrected by way of an amendment under the slip rule as contained in **Section 99 and 100 of the Civil Procedure Act,** or by way of review under **section 80** of the same Act. This limb has stands on wobbly legs and must fail.

a) <u>Security for grant of Orders? HAS APPLICANT OFFERED</u>

25. The respondents point out that is a requirement under Order 42 that an applicant seeking stay pending appeal must provide security so that in the event the intended appeal is dismissed then the other party will have their rights secured and will be able to enjoy the fruits of the Judgment of the Court in their favour.

26. The respondents point out that the estate is vast and the applicant is the only person who is aggrieved with the confirmation of grant and distribution of the Estate. The 1st Petitioner/respondent who is his 70-year-old mother) and her 5 other children are content with the findings of the court and it would be extremely prejudicial to them if an Order of stay is granted as prayed and without any security being offered by the Applicant.

27. They lament that the deceased died in the year 2005 and this matter was filed in the year 2006. There was however a delay in filing as the applicant declined to grant a consent or petition for grant of letters of Administration. It is only after he was served with the citation that the matter could be filed.

28. Subsequently the court ought to hold that from the record the Applicant by his conduct, has been the reason for the delay in making progress in the matter.

29. The 1st Petitioner who is a widower of the Deceased is over 70 years old and her health has over the years deteriorated. She requires urgent surgery as demonstrated by the medical reports and documents attached to her Replying Affidavit and requires funds urgently to enable her obtain treatment.

30. It is therefore necessary that the Application by the applicant is dismissed so that the 1st Petitioner is able to access funds in the bank account as well as used proceeds from farming and or rental income to help her cater for the cost of medical treatment, air fare and care post-surgery and if an Order of stay pending appeal is granted she will be greatly prejudiced as she does not have any other source of income.

31. Further, that the 1st Petitioner/respondent and her Children with the exception of the applicant have all tried to preserve the Estate, the conduct of the applicant has been to the contrary as he has failed to preserve the estate and has destroyed and wasted part of it, he has received income from the Estate that he has failed to account for, he has threatened and acted violently towards the 1st respondent and his Sisters, he has forcefully occupied the guest house at the Ilula property which is the Deceased and 1st Petitioner's matrimonial home, he has leased out the Muhoroni property without the knowledge and or consent of the other parties and the other factors as a result of which the Court granted conservatory restraining orders against him in the year 2015 until confirmation of grant and which he continued to disobey.

32. That the effect of an Order of stay and considering the period it took before confirmation of grant and without any Security would be to occasion further prejudice and a great injustice to the 1st Petitioner and the other Respondents as they will continue to wait to enjoy the fruits of the Judgment of the Court while the Objector benefits from the same to their exclusion and without accounting for such benefit.

33. It is submitted that an applicant must satisfy the requirements of the provisions of **Order 42 Rule 6** and even if the Applicant is willing and capable of offering security for the performance of their obligations, the application still fails for reason of his failure to demonstrate any substantial loss he stands to suffer if the present application for stay is not allowed and the fact that the appeal would not be rendered nugatory if the current application is dismissed.

34. As already pointed out in the earlier part of this ruling, and I concur with the respondents' submissions that, by undertaking not to transfer the title to the properties, the Petitioners essentially guarantee that in case the Applicant's appeal succeeds, then all that would need to be undertaken is the transfer of the properties in the Applicant's name. The Applicant has properties distributed to him including one with a developed house that he can occupy and part of the Muhoroni plot that he can farm or lease and earn an income even as parties await hearing and determination of the intended appeal.

35. I also draw from the observations made by the court in Chris Munga N Bichage v Richard Nyagaka Tongí & 2 Others [2013] e KLR that:

36. *"…The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory [Emphasis added]. These two limbs must both be demonstrated, and it would not be enough that only one is demonstrated…"*

I find that the applicant has failed to meet the test and the application must fail. I can do no better than to sum it up in a paraphrased manner as was stated in the case of *Absalom Dora vs Jaibo Transporters [2013] eKLR*, the *relief for stay of execution pending appeal is must be on the basis that no one party would be worse off by virtue of an order of the court, as such order does not introduce any disadvantages but administers justice that the case deserves. I make this finding bearing in mind that that both parties have rights, the applicant to this appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits to the decision of the court***.**

Consequently, the application be and is hereby dismissed with costs to the respondents.

Delivered online with consent of:

RIOBA OMBOTO & CO ADV for the Applicant

KENEI & ASSOCIATES for Respondents

Further order:

A soft copy to be availed to the parties through their email addresses.

Delivered, Signed and Dated this 8TH day of April 2020 at Eldoret

H. A. OMONDI

JUDGE